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In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
APPELLANTS,

v.

THE STATE OF MISSISSIPPI, *et al.*,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF THE ENERGY LAW INSTITUTE AND THE STATE OF MAINE, *AMICI CURIAE*

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BRIEF OF THE ENERGY LAW INSTITUTE AND THE STATE OF MAINE, *AMICI CURIAE*

Interest of *Amici Curiae*

The Energy Law Institute (ELI) is a non-profit research organization and is part of the Franklin Pierce Law Center located in Concord, New Hampshire.[1] Franklin Pierce Law Center is an independently established law school and has been accredited by the American Bar Association.

The work of the ELI involves basic legal and economic research for a variety of contracting agencies and organizations on energy law, regulation, and regulatory and institutional relationships and systems. The ELI has performed and continues to perform sponsored research and represents public and private interests in many of the energy issues that are the subject of the Public Utility Regulatory Policies Act of 1978, Pub.L. No. 95-617, 92 Stat. 3117 *et*

[1] All the parties to this case have consented to the filing of this brief pursuant to United States Supreme Court Rule 36.2. The letters of consent have been filed with the Clerk of this Court. This brief is filed in support of the Appellants.

seq. (PURPA). For example, the Institute is nationally recognized for its ongoing research in federal and state legal and regulatory obstacles and incentives for small-scale hydroelectric development.

The particular interest of the ELI in this case stems from its current work of providing technical assistance to the Tennessee Valley Authority and fifteen state public utility commissions in their implementation of Section 210 of PURPA. These states include the six New England states, Arkansas, Colorado, Georgia, Montana, New York, North Carolina, Oregon, Pennsylvania and Virginia. In the course of this work, the ELI has had the opportunity to work on a day to day basis with the staffs and commissioners of these state commissions in the development of their regulatory policies under PURPA. The almost unanimous perspective of these states, in the opinion of ELI, is that PURPA is an example of the best type of cooperative behavior on the part of the federal and state governments and represents a reasonable and well thought out attempt to work harmoniously and synergistically toward mastering the energy problems of the nation.

PURPA addresses the concerns of the State of Maine in two ways: by maintaining a viable economic base through the promotion of the efficient pricing of energy and by encouraging the use of renewable energy resources in order to reduce the State's tremendous dependence on costly imported oil. The State of Maine has actively embraced the regulatory initiatives outlined in Titles I and III and Section 210 of PURPA. For example, the Maine Public Utilities Commission has most recently issued final rules implementing Section 210 of PURPA that are considered to be among the most progressive in the country.

It is this perspective that the ELI and the State of Maine, as *amici curiae*, bring to bear in this brief in support of the constitutionality of PURPA.

Summary of Argument

I. Congress, in passing PURPA, did not transgress the narrowly defined Tenth Amendment limitations on the exercise of its commerce clause powers, as those limitations were recently set out by this Court in *Hodel* v. *Virginia Surface Mining and Reclamation Assoc., Inc., et al.*, 101 S.Ct. 2352 (1981).

A.1. The challenged provisions of PURPA are not directed at the States. They have as their targets the electric and natural gas utility industries. By focusing on the proprietary activities of these industries and enlisting the cooperation of the states only to the extent that they have chosen to regulate certain utilities, PURPA fails to meet *Hodel's* first test. By contrast, the Fair Labor Standards Act amendments at issue in *National League of Cities*, v. *Usery*, 426 U.S. 833 (1976), were aimed squarely at *states'* employees and at the *states* as employers.

PURPA, similar to the Surface Mining Act, merely gives the states a regulatory role to play, and only does so incidentally. In this way, Congress avoided having to totally preempt the role of the states in utility regulation.

2. PURPA does not threaten the independent, autonomous existence of the states. The Act's challenged provisions are concerned with matters that cannot be found to be essential to the survival of the states. Section 210's ratemaking provisions involve wholesale transactions, which have not been within the ambit of state authority for decades. The retail ratemaking standards of Titles I and III are suggestive. The states are free to consider and reject all of the standards in these two titles. All of the challenged provisions of PURPA contain adequate safeguards of state sovereignty and fail to meet the second test of *Hodel*.

3. The essence of *Hodel's* third test is the right of a state's citizens to have their state government represent them. This right, of course, is coincident with the right of our nation's citizens to a responsive and democratic federal government. Congress, in passing PURPA and fulfilling its mandate under the interstate commerce clause, did not directly impair the ability of the state governments to meet their democratic mandates.

PURPA goes much further than the Surface Mining Act in allowing the states the flexibility to fashion policymaking decisions to fit local concerns. The states embraced Congress' encouragement to experiment in their implementation of Section 210 and Titles I and III of PURPA. As a result, there has been a wide range of implementation strategies adopted. The few ratemaking standards that are required to be implemented apply to wholesale transactions, a traditionally federal concern. In addition, even though financial

impact on the states cannot, in and of itself, act to discredit a federal act, PURPA does provide the states with millions of dollars to help defray the costs of implementing its various regulations.

B. PURPA was enacted by Congress under its plenary commerce clause power and represents cooperative federalism at its best. Neither the advantages of a uniform, national approach to this country's energy crisis nor the benefits of varied approaches to local implementation have been sacrificed. PURPA is a reasonable and appropriate Congressional attempt to ameliorate the economic problems—double digit inflation, increasing unemployment, diminishing productivity—that were largely the consequence of a deteriorating energy supply picture in this country. As a result of one of the most extensive legislative inquiries in our history, Congress determined that federal laws were needed to lower the interstate, commercial barriers that served to worsen our energy situation and exacerbate the economic ills that had befallen the nation and the states.

The minimal intrusions upon the states that PURPA necessitates, on balance, are clearly justified by the critical federal interests involved, so as to insulate the Act under the analysis of footnote 29 of *Hodel. Id.* at 2366.

II. The provisions of PURPA at issue in this case were also Constitutionally enacted pursuant to the plenary power of Congress to protect and enhance the national security of the United States ("the war power"). This Act is a comprehensive piece of legislation that was designed to reduce or eliminate the threat to national security posed by the great dependency of the United States on oil imported from a politically unstable and troubled region of the world, the Persian Gulf and North Africa.

Rapidly increasing oil prices, and energy prices generally in the United States, were closely related to the cartel activities of the oil producing nations principally located in the Persian Gulf. At the time of the debates on the National Energy Act, the United States was importing 40% of its daily oil requirements. The dependency of the United States on imported oil rendered the American economy vulnerable to crippling price increases and supply shortages which, in turn, would necessitate military readiness and,

possibly, intervention to protect vital American interests in the Persian Gulf. Measures that prompted conservation of energy and more efficient use of energy or stimulated development of indigenous renewable energy resources were perceived by Congress as being able to reduce this threat to national security by conserving or displacing oil.

The State of Mississippi and Mississippi Power and Light Company claim that the provisions at issue are impermissible intrusions into state functions and institutions as protected by the Tenth Amendment. These claims do not withstand scrutiny in light of the limited and flexible nature of the challenged provisions and the immediate and serious threats to national security that these provisions address.

Titles I and III of the Act are principally designed to encourage conservation of electricity and natural gas through different costing methodologies, rate designs and measures to control consumption of electric and gas service. The generation and sale of electric power by cogenerators and small power producers utilizing renewable energy resources ("qualifying facilities") are encouraged under Section 210 of the Act. These provisions are directly and substantially related to reducing the threat to the national security that is occasioned by this country's dependency on foreign oil.

The capstone, of course, is that Congress undertook this experiment in "cooperative federalism" when it clearly had the authority under the war powers to divest state regulatory commissions of all authority in the area.

Argument

I. PURPA Is Consistent With the Federalist Structure of Our Nation and, Accordingly, Does Not Transgress Tenth Amendment Constraints on the Power of Congress To Enact Legislation Under the Commerce Clause.

The issue here is federalism, the relationship of the several states to the Union as a whole. The particular aspect of the federal relationship being questioned is the interaction between the Tenth Amendment and the federal commerce clause. U.S.

CONST. art. I, § 8, cl. 3. Federalism, as a rule of government, strikes a balance of power between the indestructible Union and the indestructible states. *See Texas* v. *White*, 74 U.S. (7 Wall.) 700 (1869). The essence of this balance is that "(n)either government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf and Eddy* v. *Mitchell*, 269 U.S. 514, 523 (1926). This balance recognizes that some circumstances require uniform, national regulation and at the same time recognizes the value of the states as laboratories for social and economic experiments, *see New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting), and the value of political accountability of the federal government to the citizens of the several states.

As the Court is well aware, the several sovereign states, at the formation of the Union, agreed to give up a portion of their sovereignty to a federal entity for their common good. The federal power is supreme within the scope of those powers relinquished by the states. U.S. CONST. art. VI, cl. 2. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). However, the federal government is one of limited powers and must yield when it encounters a constitutional constraint upon the exercise of its power. U.S. CONST. AMEND. X and *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

In the instant case, the federal power being exercised is derived in part from the interstate commerce clause of the Constitution. U.S. CONST., art. I, § 8, cl. 3. It is well settled law that at the formation of the Union this power was relinquished by the states. *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). Clearly, the federal government has plenary power in the exercise of this authority, *Id.* at 196, when exercised over intrastate activities which have a substantial effect on interstate commerce or when regulation of the intrastate activity is an appropriate means to the attainment of the regulation of interstate commerce. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *United States* v. *Darby*, 312 U.S. 100 (1941).

In the case at bar, the states' side of the federalism balance is the power that they derive from the Tenth Amendment. *See*

National League of Cities, supra. Congress, in the exercise of its commerce clause power, may not directly regulate the states in their sovereign capacity so as to cause a reallocation of federal and state powers and, thereby, upset the constitutionally created balance between the co-existing sovereigns.

The principles that control the interaction between the Tenth Amendment and the Commerce Clause have recently been articulated by the Court in *Hodel* v. *Virginia Surface Mining and Reclamation Assoc., Inc., et al.*, 101 S.Ct. 2352 (1981), which upheld the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1976 ed., Supp. III) against a *National League of Cities* challenge. In that opinion, the court drew a critical distinction between federal commerce clause legislation that "commandeers the legislative process of the states by directly compelling them to enact and enforce a federal regulatory program" and federal commerce clause legislation that "establishes a program of cooperative federalism." The Court found that the former violated Tenth Amendment constraints whereas the latter did not. *Hodel* at 2366.

Clearly, PURPA does not reallocate the balance of power struck by federalism. PURPA is cooperative federalism at its finest, for Congress could have chosen to preempt both the retail and wholesale aspects of electric and natural gas regulation. *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977); *Public Utilities Commission of Rhode Island* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927) and the Federal Power Act, 16 U.S.C. § 824 *et seq.* That the Congress chose not to preempt the states in this area, and chose rather to allow them to participate as partners in the PURPA scheme, demonstrates Congress' sensitivity to federalism concerns. As the Court stated in *Hodel:*

> Thus, Congress could constitutionally have enacted a statute prohibiting any state regulation...we fail to see why the...Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role. *Hodel* at 2367.

In deciding this case, the Court must evaluate the provisions of PURPA in the context of federalism. The Court in *National League of Cities* and *Hodel* provided the tools for this evaluation. *Hodel* provides an initial inquiry in the form of a three part test:

> First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Hodel* at 2366.

This test focuses exclusively on the state side of the federalist balance. For, absent the substantial intrusion outlined by *Hodel's* three prong test, the federal interest in free-flowing, healthy, interstate commerce is plenary and the Congressional exercise of its commerce clause power is presumed constitutional.

In the event that a state makes the required showing that a federal Act meets all three prongs of the *Hodel* test, that case requires that the federal Act must nevertheless stand if the federal interest involved is "such that it justifies state submission". *Hodel* at 2366 n.29. (Citing *Fry* v. *U.S.*, 421 U.S. 542 (1975) and *National League of Cities*, at 856 (Blackmun, J., Concurring)). This "escape clause" effectively changes the focus of the inquiry from the state side of the balance to the balance as a whole. A court must still find a challenged Act to be constitutional if the federal interests underlying that Act outweigh the intrusions on the states' Tenth Amendment concerns. For example, such demonstrably greater federal concerns as environmental protection and energy independence will preserve a Congressional enactment against a Tenth Amendment challenge.

This brief will track the analytical framework set forth by the Court in *Hodel*. It demonstrates that PURPA meets none of the three parts of the *Hodel* test and that the federal interests involved far outweigh the minimal intrusion on the states that the Act occasions. PURPA is a well-reasoned and moderate approach to a critical problem affecting interstate commerce.

A. Application of the Three Part Analysis Articulated by the Court in *Hodel* Demonstrates That PURPA Does Not Transgress Tenth Amendment Constraints.

1. *PURPA does not regulate states as states*

The initial step in the analysis of whether congressional exercise of legislative authority pursuant to the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, transgresses the constraints imposed by the Tenth Amendment to the U.S. Constitution is to determine whether "the challenged statute regulates the 'states as states' ", *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc., et al. supra* at 2366, quoting from *National League of Cities* v. *Usery, supra* at 854. An examination of Titles I and III of PURPA and Section 210 of PURPA reveals that the Act does not attempt to regulate the "states as states" but, rather, is primarily directed at private industry and provides the states with an opportunity to play a cooperative role in the federal government's regulation of a part of that industry. As such, PURPA does not meet *Hodel's* first test and, therefore, does not infringe upon the Tenth Amendment rights of the states.

The majority opinion in *Hodel* indicates that the first test goes to whether the challenged federal statute is directed primarily at the actions of the states or at the actions of private individuals and businesses. This, of course, is a key difference between the Court's striking down of the 1974 amendments to the Fair Labor Standards Act (FLSA) in *National League of Cities* and its upholding of the Surface Mining Act in *Hodel*. The FLSA amendments were aimed directly at the internal operations of the state governments, "*directed* not to private citizens but *to* the States as States" (emphasis added). *National League of Cities*, at 845. By way of contrast, the Surface Mining Act has as its primary target the private mining industry. As stated by the Court in *Hodel*, the Surface Mining Act merely gives the States a "regulatory role" to play. *Id.* at 2366.

PURPA is very much like the Surface Mining Act in this regard. The targets of the Act's provisions are the electric and natural gas utility industries. The requirements that do affect the state regulatory authorities, that they "consider" certain standards (Title I and III) and implement FERC's Section 210 regulations, are merely incidental to the concededly plenary Congressional powers to regulate interstate commerce. This is evidenced by the fact that the requirements of PURPA apply to all utilities, regardless of whether they are regulated by the states. By enlisting the states' assistance in reaching regulated utilities, Congress has avoided the confusion, greater expense (both monetary and political) and duplication that would have accompanied direct preemption of the states' role in this area. It was precisely because of this concern for preserving the role of the states in public utility regulation that PURPA was structured in the way that it was. Rather than directly and totally occupying the field of public utility regulation, indisputably subject to the dual sovereignty of the nation and the states, PURPA directs minimal federal standards to the public utility industry. Where the states have chosen to regulate certain of those utilities, that choice is preserved and the state regulatory authorities are merely asked to play a "regulatory role" with regard to those standards. In fact, PURPA provides the states with a great deal of flexibility to adapt the federal standards to local conditions. In this way, the best features of cooperative federalism are preserved.

The difference between the regulation of private industry and of the "States as States" is, of course, of primary importance. The supreme authority of the Congress to regulate the activities of private industry in interstate commerce is attested to by a "wealth of precedent". *Hodel* at 2367 (citing, *inter alia*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 337 U.S. 132 (1963) and *Hines* v. *Davidowitz*, 312 U.S. 52 (1941)).

The point at which a "mere regulatory role" becomes regulation of the "States as States" must inevitably be determined by the

degree and the directness with which the federal Act focuses upon the "States as States." In *National League of Cities*, the FLSA was found to be a substantial regulation of the states focused directly upon them and their employees. Unlike that Act, PURPA is designed to encourage electric and natural gas utilities to change their behavior. These targets of the Act are engaged in proprietary activities. *See United States* v. *California*, 297 U.S. 175 (1936). The states are involved only insofar as they provide the federal government with easier access to those utility companies that the states have chosen to regulate. Similar to the Surface Mining Act upheld in *Hodel*, PURPA only involves the states minimally and incidentally and, as a result, does not meet the first prong of the *Hodel* test.

2. *PURPA does not address indisputable attributes of state sovereignty.*

The question at issue here, whether the federal enactment addresses matters that are "indisputably attributes of state sovereignty" (*Hodel*, at 2366, quoting *National League of Cities*, at 845), is of major importance. However, the concept of sovereignty is subject to varying definitions. As used in the cases of *National League of Cities* and *Hodel*, and the decisions from which they draw support, the concept of state sovereignty has a very specific meaning tied directly to the continued vitality of the states as independent political bodies. The essence of this second test of *Hodel*, then, is the right of a state to a separate and autonomous existence.

It is clear that PURPA does not address this attribute of state sovereignty and, therefore, fails to meet the second test in *Hodel*.

There has long been the concern that the independent autonomous existence of the states in our federal system not be threatened. *See, e.g., Texas* v. *White*, 74 U.S. (7 Wall.) 700, 725 (1869), "The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States". The right to a separate and autonomous existence was also discussed in *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71 (1869). This case

was quoted by the Court in *National League of Cities* when it referred to "functions essential to separate and independent existence", and in so quoting, the Court linked that concept to "an undoubted attribute of state sovereignty". *National League of Cities* at 845. *See also Coyle* v. *Oklahoma*, 221 U.S. 559 (1911). Similarly, in *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514 (1926), also quoted in *National League of Cities* at 844, it was said that "neither government may destroy the other." *Id.* at 523.

When PURPA's requirements are compared with cases of this Court that have held certain Acts of Congress to be violative of the Tenth Amendment, it is clear that a key difference between those holdings and the case at bar is the manner in which PURPA affects state sovereignty, i.e., the right of the states to retain powers essential to their survival.

Unlike the interference with the right of a State to allocate its own resources among the cogs of its governmental machinery, its employees (*National League of Cities*), PURPA makes no such demands on the States. And unlike the expectation that a State, as a condition to its admittance into the Union, must stand on such an unequal footing with its sister States that it be "shorn" of its power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose", *Coyle* v. *Oklahoma*, 221 U.S. 559, 565 (1911), PURPA expects no such sacrifice of dignity. Rather, PURPA: (1) requires the states "to consider" certain electric and natural gas retail ratemaking standards (Titles I & III) and (2) provides the states with an opportunity to fashion, according to local concerns, a national policy to encourage small renewable energy power production and cogeneration. (Section 210). Neither of these requirements seriously threatens the survival of the states as independent and autonomous bodies.

Titles I and III are the least obtrusive elements of PURPA as regards the roles of the Mississippi Commission. They do not dictate what policies must be adopted and, therefore, do not

displace the state regulatory authority's rulemaking or adjudicatory rights and privileges. Sections 111(a) and 303(a) each contain an identical sentence indicating the advisory status of Titles I and III, respectively: "Nothing in this section prohibits any State regulatory authority or nonregulated utility from making any determination that it is not appropriate to implement any such [PURPA] standard, pursuant to its authority under otherwise applicable State law." Furthermore, sections 117(b) and 308 go on to establish that "Nothing in this title [I & III, respectively] prohibits any State regulatory authority. . . from adopting, pursuant to State law, any standard or rule affecting utilities [electric and gas, respectively] which is different from any standard established by this title." It cannot be seriously contended that these non-binding Congressional recommendations threaten the autonomous and independent existence of the states in our federalist system.

Section 210 of PURPA, albeit in the context of providing the states with a great amount of flexibility, does set out certain standards that state regulatory authorities are required to implement. Notwithstanding this fact, Section 210 neither threatens to destroy the independent, autonomous existence of the states nor does it address matters that are "indisputable attributes of state sovereignty". Section 210 of PURPA primarily concerns the regulation of sales of energy by small power producers or cogenerators to utilities. Certainly this type of utility regulation cannot be said to be essential to the existence of the states; states existed separately and independently long before public utilities were regulated. In fact, the Plaintiffs below stated that the Mississippi Public Service Commission has only had jurisdiction over electric and natural gas utilities since 1956. Exhibit 1, at 3, to Plaintiff's Motion For Summary Judgment to the United States District Court for the Southern District of Mississippi.

Section 210(b) is the principal ratemaking standard in Section 210. The transactions governed thereby are, in essence, wholesale sales of electricity. As such, this paragraph can hardly be said to address a matter of state sovereignty, insofar as the

states have generally not had jurisdiction over this area since at least 1935, and certainly not with regard to investor owned utilities.[2] *See Public Utilities Commission of Rhode Island* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927) and the Federal Power Act, 16 U.S.C. § 824 *et seq.* Congress, by providing the States with new wholesale ratemaking authority, has expanded their powers *vis-a-vis* the Federal government, not restricted them. Tenth Amendment principles of federalism are concerned with threats to the states' spheres of influence, not enlargement of them.

Paragraph (c) of § 210 does address retail sales of electricity to small power producers. Though states generally do regulate retail sales, this is hardly so essential a state activity as to be deemed an "indisputable attribute of sovereignty." And it cannot be reasonably maintained that the continued survival of the states is threatened by the limited way in which retail sales are regulated by Section 210(c) of PURPA. Paragraph (c) of Section 210 only affects those retail purchases that are operationally required by qualifying facilities. Prior to the enactment of PURPA, many qualifying facilities would have been included in the Federal Power Act "public utility" definition. Sales to these facilities would have been considered wholesale sales and regulated by the federal government, not the states. Thus, paragraph (c) of Section 210 also expands the regulatory authority of the states. Finally, the FERC rules promulgated pursuant to this paragraph allow the states to apply their existing retail sales tariffs to purchases by qualifying facilities as they see fit, absent a finding of discrimination.

To argue that a state's regulatory authority over electric and natural gas retail sales is a constitutionally protected, indisputable attribute of state sovereignty is difficult at best. This position ignores the uncontroverted power of the Federal govern-

[2] As of 1979, privately owned utilities accounted for 78.1% of the electric utility generation in the United States. U.S. DEPARTMENT OF ENERGY, STATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE UNITED STATES—1979, Table 11.

ment to preempt state authority in this area. In a field of regulation that the Federal government could have occupied entirely, an Act of Congress is not constitutionally suspect simply because it provides the states with a regulatory role. *Hodel* at 2367. State regulation of activities that are subject to the joint jurisdiction of state and federal authorities is not essential to the state's existence. *See Friends of the Earth* v. *Carey*, 552 F.2d 25, 38 (2d Cir. 1977), *cert. denied*, 434 U.S. 902 (1977).

3. *PURPA does not directly impair the ability of states to structure integral operations in areas of traditional governmental functions.*

This third test of *Hodel* is different from the second in two respects. First, the Court has consistently used the expression "governmental functions" to refer to the relationship of the states to their citizens, whereas the idea of "sovereign attributes" concerns the position of the states *vis-a-vis* each other and the national government. The second key difference is that this third test is concerned with effect. While the second test only asked whether the federal legislation "addresses" sovereignty, *Hodel's* third requirement demands to know the impact of the challenged law. This part of the brief, then, will demonstrate that PURPA does not impair the states' ability to provide its citizens with the integral functions or services they have traditionally come to expect their states to provide, *i.e.*, PURPA does not meet the third test of *Hodel*.

The most critical aspect of a state's relationship with its citizens is its lawmaking power. In upholding the constitutionality of the Surface Mining Act, the Court in *Hodel* felt compelled to point out that "there can be no suggestion that the Act commandeers the legislative processes of the States by compelling them to enact and enforce a federal regulatory program". *Id.* at 2366. *National League of Cities* states at one point that "the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators", *Id.* at 848, and goes on to refer to "this congressionally imposed displacement of state decisions. . . .". *Id.* at 849.

In light of the foregoing, it should come as no surprise that Counsel for Appellees, the State of Mississippi and the Mississippi Public Service Commission, have argued in their Motion to Affirm that "PURPA interferes with the most sovereign of states' attributes...the quasi-legislative and quasi-judicial roles of Mississippi Public Service Commission, as well as state legislative and state judicial decision making." *Id.* at 12. By couching their point in terms of interference, the Appellees have set out in this quote both of the key aspects to this third test of *Hodel:* The right of the states to enact their own laws and policies, *i.e.*, structure traditional functions, and the direct impairment of this right.

The argument that PURPA interferes with the state legislative and judicial deision-making roles is perhaps the easiest to dismiss. One way in which PURPA might be said to interfere with a state's legislative decision-making concerns potential conflicts between PURPA and state laws governing utility regulation. *Hodel* only echoed the now familiar list of cases that attests to the supremacy of the federal authority to regulate private activity and preempt conflicting state enactments. *Hodel* at 2367.

As for the alleged interference with the states' judicial decision-making process, this issue is also well settled. *Testa* v. *Katt*, 330 U.S. 386 (1947), established a general constitutional duty for states to vindicate federal claims in their own courts to the extent that they would entertain similar state claims. A cause of action under Sections 123, 210(g) or 307 of PURPA would no doubt be sufficiently analogistic to state claims to not be an invalid intrusion. Any potentially infirm procedural dissimilarities have been avoided by the express mandate in Section 123(c)(1) and 307(b)(1) of PURPA that state judicial review "be pursuant to applicable state procedures." *See also Gulf Offshore Company* v. *Mobil Oil Corp.*, 101 S.Ct. 2870, 2875 (1981).

The more serious challenge concerns the quasi-judicial and quasi-legislative roles of Mississippi's Public Service Commission. This is because the federal program enacted through PURPA

does require the state regulatory authorities to consider and implement standards and regulations that were not the result of deliberations by those state authorities.

The idea of a state's ability to enact its own laws and set its own policies may seem at first blush to be merely a question of whether the federal provisions mandate state action or merely allow it as an option. However, the question is more meaningfully stated. Has the ability of the state to set its own policies actually been undermined? In *National League of Cities* and *Coyle* v. *Oklahoma*, *supra*, the answer was in the affirmative. The Court in *Hodel*, however, reached the opposite conclusion.

On the face of it, the states were seemingly given the option to not "participate in the federal regulatory program in any manner whatsoever," *Hodel* at 2366. However, the substance of that choice was limited. Either a state agreed to enforce hundreds of pages of surface mining regulations (*See* 30 C.F.R. Part VII) or the federal government would enforce those same hundreds of pages of regulations. In terms of the standards to be applied to surface mining in Virginia, or any state, it was a Hobson's choice, indeed. *Hodel* recognized that "[A]ppellees' claims to this effect accurately characterized the Act. . . ." *Id.* at 2367.

PURPA, in contrast to the Surface Mining Act, allows the states a great deal of freedom in those areas of utility regulation that are covered by the Act. Titles I and III merely ask the states "to consider" several ratemaking standards. The states are free to adopt them or not as they see fit. *See* Sections 111 and 303 of PURPA. Also, unlike the Surface Mining Act, if a state chooses not to adopt a PURPA standard, *e.g.*, the lifeline rate standard of Section 114 or the natural gas service termination standard of Section 303 of PURPA, the federal government will not step in and impose those standards on the electric and gas utility industries. The states will still be free to see that their own policies in these areas will be effectively implemented. In this regard, as previously noted, both Sections 117(b) and 308 of PURPA guarantee the states' right to adopt standards and rules in con-

travention to those set out in Titles I and III, respectively. It cannot be seriously put forth that a non-binding series of recommendations spelled out by Congress for the states to "consider" directly impairs the states' right to set their own policies, certainly not when compared with the greater impairment held valid in *Hodel*.

While Section 210 is slightly more restrictive, it nevertheless provides the states with a great amount of freedom. The Section and the regulations adopted to implement it allow the states the option of applying to FERC for a waiver from the requirements of Section 210 of PURPA. *See* 18 C.F.R. § 292.403. The principal prerequisite for the FERC granting a waiver to a state is a showing by that state that the goals of the Section, the encouragement of cogeneration and small power production, are being sufficiently met by that state without the need for the federal rules. In this way, the Section is not unlike the Surface Mining Act and other Congressional enactments that "allow the states, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs" *Hodel*, at 2366. This point is further demonstrated by the great flexibility provided even to those states that choose to administer the Section 210 program. The FERC regulations provide that the states are free to use "any other action reasonably designed to implement" the major substantive standards of the regulations. *See* 18 C.F.R. § 292.401. The recognition by FERC of the fact that "economic and regulatory circumstances vary from state to state and from utility to utility" led it to "afford the state regulatory authorities . . . great latitude in determining the manner of implementation of the Commission rules . . ." 45 Fed. Reg. 12230-31 (1980).

It is through precisely this type of flexibility that the best features of "cooperative federalism" are realized. Neither the central approach to a serious national problem, nor the localized response to the needs of a state's citizens are sacrificed. Rather than hinder the principles of federalism, PURPA actually furthers them.

It is interesting to note how Section 210's encouragement to experiment has been embraced by the various states. State commissions have adopted quite specific and individualized approaches to implementation, with some states' policies diametrically opposed to others.

A few states, such as New Hampshire, have set flat rates applicable to all facilities that qualify for the benefits of Section 210, pursuant to generic hearings. Other states, such as Idaho, have set time of day and seasonal rates to more closely follow the fluctuations of avoided costs over time. Vermont, rather than setting utility-specific rates, has adopted the avoided costs of the regional interstate transmission system, the New England Power Pool.

The FERC regulations concerning avoided cost calculations have also been subject to varying interpretations by the state commissions. Colorado has utilized long-run marginal costs in its calculations; New Hampshire has used short-run. South Carolina used a computer production model, simulating marginal costs at various load demands. Wyoming will base avoided costs for non-generating utilities on their wholesale purchase rates, while Rhode Island will use the avoided costs of the supplying utilities for this purpose.

The extent and scope of state commission involvement with utility/qualifying facility contracts has also varied. New Mexico expects the qualifying facilities and the utility to work out their problems and only utilize the commission as a last resort dispute resolver. The California Public Utilities Commission, on the other hand, has gone so far as to reduce Pacific Gas and Electric Company's authorized return on equity for its electric department by 20 basis points. This was ordered as a penalty for the company's perceived inadequate efforts in independently pursuing the purchase of power from small power producers and cogenerators. Cal. P.U.C. Decision No. 91107 (Dec., 1979).

To the degree that Section 210 of PURPA does replace some of the states' freedom to fashion their own policies, it is imperative to reiterate that these are policies which have not "traditionally" been the states' to set. As discussed in Part I.A.2. of this brief, the primary focus of Section 210 is wholesale ratemaking, an area

of regulation that has been foreign to the states for half a century. Section 210 of PURPA could not possibly be said to directly impair the states' ability to structure "integral operations" in areas of "traditional functions" of wholesale ratemaking has been neither an operation nor a function of the states. As such, the citizens of a state cannot be said to have had their rights to a locally responsive, representative government infringed by PURPA.

A final point concerning impact/impairment involves the financial effect of having to implement PURPA on the state of Mississippi and its Public Service Commission. It is true that PURPA will necessitate, in some instances, the expenditure of state funds. However, even if no provision for federal reimbursement had been made in the legislation, the imposition of costs upon a state, absent some significant policy impact, does not transgress the Tenth Amendment. The court effectively dismissed that contention in *Hodel*, when it stated that the determinative factor in *National League of Cities* was "the nature of the federal action, not the ultimate economic impact on the states.... Moreover,...a measurable impact on [a State's] economy...standing alone, is insufficient to establish a violation of the Tenth Amendment." *Hodel* at 2365 n. 33.

When this footnote is read in the context of the body of the *Hodel* opinion, it is clear that federal enactments are to stand or fall on the federalism concerns heretofore discussed. Financial impact is only important to the degree that it infringes on those concerns. Congress more than demonstrated its determination that the costs of complying with PURPA should not affect the States' "ability to structure" any of their operations, by authorizing $40 million to the States to carry out their responsibilities under PURPA (Sections 141 and 142 of PURPA). However, all of the reasons and arguments presented in this brief support the fact that Titles I and III and Section 210 would in no way transgress the Tenth Amendment rights of the states, even without financial assistance from Congress.

B. *The Substantial Federal Interest Advanced in PURPA More Than Justifies the Act's Minimal Intrusions Upon States' Tenth Amendment Rights.*

Footnote 29 to the *Hodel* opinion provides, where necessary, an additional approach to cases such as the one before the Bar. It provides that "the nature of the federal interest advanced may be such that it justifies state submission" to the challenged federal legislation even though the three part conjunctive test of *Hodel* has been met. *Id.* at 2366, citing *Fry* v. *United States*, 421 U.S. 542 (1975) and *National League of Cities* at 852-853 and 856 (Blackmun, J., concurring).

Heretofore, this brief has focused primarily on the nature of the states' interests. This is the analysis required by the three part test set out in the text of the *Hodel* opinion. Should the Court find, however, that the challenged provisions of PURPA meet all three of *Hodel's* aforementioned requirements, footnote 29 of *Hodel* and the analysis found in the cases cited therein require the Court to engage in a balancing test. It is beyond dispute that the extreme threat to our nation's economic well-being that has continued to exist since 1973 more than outweighs the minimal intrusion on state sovereignty occasioned by the remarkably restrained approach that Congress took in its enactment of PURPA.

The federal government must be capable of intervening when a national problem is being exacerbated by the very separateness of the states that the Tenth Amendment protects. It was the frustration with not having such a federal presence that served as one of the most powerful motivations for convening a constitutional convention. *See* FARRAND, FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913). Under the Articles of Confederation, discriminatory, self-interested regulation by the states was threatening to destroy the Union. The resulting commerce clause was designed to provide a means of enacting national, uniform regulation in areas of commerce that the states could not efficiently or fairly regulate: commerce involving more than one state.

That there is a rational relationship between the regulation of the electric and natural gas industries and the objectives of the commerce clause powers is beyond dispute. This relation is more than amply supported by the fact that our nation is in the midst of a transition in energy markets due to significant price and supply fluctuations of domestic and foreign energy resources. These fluctuations have had and continue to have a dramatic effect on the economy and the livelihood of the whole nation. This legislative history has been well documented by the Appellants and will not be repeated here. Suffice it to say that Congress had a plethora of testimony to support its finding that the energy supply picture, and more particularly, the regulation of the electric and natural gas industries was significantly affecting interstate commerce. Electric and natural gas industries are comprised of interstate transmitting and distributing grids which, as a whole, display a high degree of sensitivity to factors affecting any one of their parts. Wholesale sales of energy transmitted in interstate grids or on a grid interconnected with interstate grids are clearly within the power of the federal government to regulate pursuant to the commerce clause. *See FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972). Thus, Section 210 of Title II of PURPA, which concerns wholesale transactions between electric utilities and qualifying facilities, is clearly within the reach of the federal commerce power.

Titles I and III of PURPA, which require the states to consider certain retail ratemaking standards, are proper as legislation in an area that significantly affects interstate commerce. The relationship between these retail electric ratemaking standards and interstate commerce arises quite often in the context of retail rate cases. This idea was prominent during the hearings into the various energy bills that make up PURPA's legislative history. Peter Bradford, then Chairman of the Maine Public Utilities Commission, stated: "(I)t is essential . . . that the movement to marginal cost pricing take place . . . uniformly . . . The New England Power Pool will not achieve maximum efficiency if only half of the six states resort to marginal cost pricing . . . ." Electric Utility Rate Reform and Regulatory Improvement: Hearings on H.R. 12461 Before the Subcommittee on Energy and Power, 94th Cong., 2d Sess. 204

(March 31, 1977) (hereinafter cited as BRADFORD). Significantly, marginal cost pricing of electric energy is one of PURPA's standards for state consideration. PURPA Title I, § 115(a), and Title III, § 306. *See* 45 Fed. Reg. 58762 (1980). Thus, it is apparent that the provisions of PURPA, as they relate to federal interstate commerce concerns, are not speculative or attenuated in nature, but rather have a direct and immediate effect upon the economic well-being of the nation and the states.

The only remaining question in an analysis of the proper authority for Congress to act pursuant to its commerce clause powers is whether the means selected by Congress were reasonable and appropriate. See *Heart of Atlanta Motel, Inc.* v. U.S., 379 U.S. 241 (1964), *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) and *United States* v. *Darby*, 312 U.S. 100 (1941).

Taken as a whole, the provisions of PURPA, Titles I and III and Section 210, are all designed to eliminate the interstate commerce barriers associated with the nation's energy problems. Through provisions that encourage utilities to more efficiently match prices to costs, that ask utilities to more effectively reduce unnecessary usage of energy by their customers and that encourage new domestic and renewable energy sources of power, PURPA strives to break down the barriers to these goals in interstate commerce. These barriers included outmoded wasteful utility rate structures and practices and utility intransigence against opening up power generation markets to new producers.[3] Testimony in Congress spoke of the need for national legislation in these areas "to avoid the lowest common denominator tendency among the states." BRADFORD. The concern over interstate disparities among utility regulatory practices, in the context of the reality of interstate power pools, had made effective, unilateral state action in the area of utility rate reform almost impossible. As a result, state after state was faced with promotional rate designs and practices from a bygone era and the fear that a change to accurate, conservation-inducing price signals would drive its needed industrial base out of

[3] *See* note on monopsony, *infra*, page 28.

state. That the measures of PURPA were reasonable and appropriate to the economic, interstate commerce problems facing this country cannot be gainsaid.

Under the balancing act approach of Footnote 29 of *Hodel*, it must still be shown that the interests reflected in the actions of Congress, on balance, outweigh the states' Tenth Amendment concerns.

The fragile energy supply picture facing this country after the Arab oil embargo was certainly as serious a national problem as the ills facing us when the Economic Stabilization Act was passed. *Fry* v. *United States*, *supra*. In fact, many would argue that the ever-spiraling inflation that necessitated the Economic Stabilization Act was brought on by a geometric rise in the price of imported oil and the ripple effect of the cost of that one commodity through every sector of our economy, from transportation and manufacturing to the cost of producing and purchasing electricity. As such, it can be argued that the "problem which endangered the well-being of all the component parts of our federal system" in *Fry* v. *U.S.*, *supra*, *(National League of Cities*, at 853), and which "only collective action by the National Government might forestall" (*Id.* at 853), was the very same problem addressed by PURPA.

PURPA was enacted by Congress as one response to this problem. By encouraging states to consider ratemaking standards designed to enhance energy conservation and the efficient use of our limited energy resources, and by providing incentives to small power producers and cogenerators tapping renewable and unused domestic sources of energy, Congress was seeking to deal with this nation's energy emergency. That it was able to do so without the imposition of so great a burden on the states as was upheld in *Fry* v. *United States*, *supra*, is to its credit. For in spite of the holding in that case, the impact that the Economic Stabilization Act had on the choices that states traditionally make, as regards allocation of resources and policy decisions necessitated thereby, was tremendous. *See Fry* v. *United States*, *supra*, at 549. (Rehnquist, J., dissenting).

Higher oil prices and interruptions in world oil supplies have contributed to high unemployment, inflation, and political conflicts in the United States as groups strive to maintain their economic positions in a world of increasing energy prices and decreasing energy supplies. Only by enacting national legislation to regulate those obstacles in interstate commerce that prevented this country from reducing its energy consumption, more efficiently utilizing the energy it must consume and increasing the development of domestic, renewable sources of energy can the economic crisis be effectively addressed. On balance, the minimal intrusions described at length throughout the discussion of *Hodel's* three-part test, when weighed against the overwhelming federal interests at issue in PURPA, leave no doubt but that the Federal legislation must stand. (*See Hodel* at 2366 n. 29).

II. PURPA Is Clearly Constitutional in That Congress, Pursuant to Its War Powers and Powers To Ensure National Security, Has Enlisted the Support of State Agencies To Assist the National Government in Addressing the Problem of the Dependency of the United States on Foreign, Unstable Sources of Petroleum.

Heretofore the discussion in this brief has demonstrated the constitutionality of PURPA as an exercise of congressional power to regulate interstate commerce. There is, however, an equally important—indeed a more important—constitutional basis for PURPA which requires special treatment. That basis is the war powers, *i.e.*, the powers of Congress to enact laws to protect and enhance the national security of the United States. U.S. Const. art. I, §8, cl. 1, 11, 12, 13, 14, 15, 16 and 18. The basis for this power, even when the United States is not presently engaged in hostilities, is well established by the cases. *See, e.g., Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936); *Case* v. *Bowles*, 327 U.S. 92 (1946); *Woods* v. *Miller*, 333 U.S. 138 (1948); *United States* v. *Oregon*, 366 U.S. 643 (1961) and *Johnson* v. *Robinson*, 415 U.S. 361 (1974).

That PURPA was enacted for the primary purpose of meeting a serious threat to national security is clear. That threat, of course, was the dependency of the United States and its industrialized allies on oil supplied by nations that were located in the Persian Gulf and North Africa and had formed an effective petroleum cartel. The dangers were that a shortfall in the supply of oil, caused by war, diplomatic tension, or internal disturbances within particular oil supplying countries would cripple the economies of the United States and its allies, necessitate military intervention to preserve oil supplies, or invite intervention in the Middle East by powers whose interests were inimical to those of the United States. *See* Hearings on the National Energy Act Before the House Ad Hoc Committee on Energy, 95th Cong., 1st Sess. (May 4, 5 and 12, 1977).

In fact, Section 2 of PURPA recites that the preservation of national security is a principal finding in support of the Act. The Joint Explanatory Statement of the Conference Managers reiterates the national security basis for PURPA. House Conference Report No. 95-1750. Congressman Ashley (D. Ohio), Chairman of the House Ad Hoc Committee on Energy, in offering the legislation for consideration by the House, cited the "constant and growing threat. . . to the security of our country" posed by increasing reliance on foreign oil. 123 Cong. Rec. 25894 (August 1, 1977). Testifying before Congress, Secretary of Defense Brown urged that the United States must make every effort possible to move toward reducing its dependence on fossil fuel. He argued that failure to do so would impose increasing risks to our national security and lead to catastrophic effects on the nation. Others supporting this view before Congress were Secretary of State Vance, and James Schlesinger, Energy Adviser to the President and soon to be the first Secretary of Energy.

That the peril was immediate is borne out by events preceding and succeeding passage of the Act. The Yom Kippur War of 1973 prompted an oil boycott by Arab nations and caused shortfalls in oil supply and threefold increases in crude oil prices. During the

period immediately prior to the enactment of the statute, Lebanon was torn asunder by civil war. Shortly after passage, the revolution erupted in Iran, another shortfall in oil supply occurred, oil prices rapidly increased again and Iran and Iraq were engaged in open hostilities.

The principal purposes of the provisions at issue here are to encourage conservation of energy (*e.g.*, through redesign of electric utility and natural gas rates, examination of load management devices and new pricing methods for utility service), to encourage more economically efficient uses of energy (*e.g.*, to seek to have electric and natural gas prices reflect true costs so that customers would have more accurate pricing signals upon which to base decisions to purchase and use energy) and to encourage more efficient use of energy and the development of indigenous renewable resources (*e.g.*, by assuring a market for the sale of electricity generated by cogenerators and small power producers).

One intended effect of the provisions of Title I was to encourage reductions of consumption of oil by reducing consumption of the electricity which in turn is generated by oil fired generating stations. A second intended effect was to encourage changes in the patterns of consumption of electricity from peak periods of the day and year, when oil fired generating plants are more frequently used, to periods of the day and year when electricity is generated by nuclear, hydropower and coal fired stations. These effects were to be achieved by consideration of ratemaking, load management and related standards by unregulated electric utilities and by state regulatory commissions with respect to regulated utilities.

With respect to the intended effects of the provisions of Title III dealing with the natural gas distribution industry, the intentions were to encourage conservation of natural gas, a resource which was perceived as rapidly diminishing in the United States.[4] The

[4] Proved recoverable reserves of natural gas in the United States, as of the time of the Congressional hearings into PURPA, had been depleted by 28.2% since 1970 and were at their lowest levels since 1952. AMERICAN GAS ASSOCIATION, GAS FACTS, 1977 DATA, 5-6. The U.N. Institute for Training and Research estimated that by 2025 currently identified reserves of natural gas would run out. National Energy Act Hearings before the House Ad Hoc Committee, *supra*, at 33.

danger was that depletion of natural gas would force users to seek substitutes and, in many instances, oil would be the most compatible substitute. To avoid this prospect, state regulatory commissions were asked to require gas utilities to consider rate design, load management and other consumption controlling devices.

The obvious intended results of Section 210 of PURPA were the encouragement of the development of indigenous renewable energy sources (wood, solar, wind, hydro, biomass) and the more efficient use of energy through cogeneration. Development of renewable, *non-oil* fired, generating facilities would replace existing oil fired generation and forestall construction of new oil fired generating stations to meet new demands. Development of cogeneration would assure that the energy developed from gas and oil fired plants would be used for an additional purpose (*i.e.*, electricity) and not "wasted". Encouragement came in the form of guaranteeing cogenerators and small producers access to the market — a market which on the purchasing side typically consists of only a single purchaser, the local utility.[5] Encouragement was also provided by exempting qualifying facilities from the burdens of federal and state utility regulation.[6]

Simply put, Congress, in enacting the provisions in question, sought to deal with a most serious threat to national security. The nexus between the national security interest and statutory provisions is substantial and there was and is reason to believe that the peril was serious.

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[5] This single purchaser problem, which is addressed by § 210, is the classical microeconomic case of "monopsony". Microeconomic theory holds that if a monopsony buyer is unregulated and unable to perfectly price discriminate, he or she will purchase less of the good offered for sale than otherwise would be purchased if there were competing purchasers. Hence, unconstrained activity of the monopsonist imposes a "dead weight loss" on society, *See* LEFTWICH, THE PRICE SYSTEM AND RESOURCE ALLOCATION, 313-314 (Rev. Ed. 1965).

[6] Estimates conclude that increased reliance on cogeneration and small power production from renewable resources could reduce the U.S.'s consumption of conventional energy sources by as much as the equivalent of 1.75 million barrels of oil per day, about 25% of the nation's present imports. FERC 1979 Annual Report, at 16. PURPA will probably directly stimulate the development of approximately 140 new cogeneration facilities, providing almost 7000 MW, by 1995. Appendix to FERC Draft Environmental Impact Statement, Docket Nos. RM79-54 and RM79-55, at B-3 (June, 1980).

In exercising its war powers to protect and enhance national security, Congress is concerned with the immediate survival of the nation or with measures to forestall or avoid peril to national survival. In undertaking this responsibility, Congress necessarily must interfere with individual state governmental institutions and functions in order that the whole nation survives or that its chances for survival are improved. The interference countenanced under national security and war powers legislation will differ in kind and degree from the types of intrusions permitted under the commerce powers. If there is any area where states' interests are subordinated to the national interest it is when the existence of the nation is threatened and Congress acts under its powers to protect the nation. *See, e.g., Woods* v. *Miller*, 333 U.S. 138 (1948); *Yakus* v. *United States*, 321 U.S. 414 (1944); *Hamilton* v. *Kentucky Distilleries*, 25 U.S. 146 (1919) and *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870). Indeed, the Constitution contemplates that all civil authority, including judicial processes associated with the Writ of Habeas Corpus, may be suspended in the face of war, invasion and rebellion. (U.S. CONST. art. I, § 9, cl. 2.)

Moreover, the Court has restated this view by reaffirming in *National League of Cities* the decision in *Case* v. *Bowles*, 327 U.S. 92 (1946) and holding that the test applied to congressional statutes enacted pursuant to the war and national security powers differs from the test applied to congressional regulation of interstate commerce. *National League of Cities*, at 854 n. 19.

Some indication as to how far the power of Congress extends under the war and national security powers is found in *Case* v. *Bowles*, *supra*. There, the State of Washington sought to auction off timber rights, which the State owned for the express purpose, as prescribed by the Constitution of the State of Washington, of raising revenues to support its public schools. This Court held that the federal price control regulation, which imposed a ceiling price on the sale of the timber and operated to deprive the state of revenues for public schools, was constitutional. The Court's reasoning was clear and direct: Congress sought to control inflation during a period of war; state activity, absent the price con-

trols would have impaired the ability of the federal government to control inflation and, hence, to wage war; accordingly, the states were constitutionally subject to price control regulation. *Id.* at 101-102.

In the instant case, Congress has clearly not gone as far as it could have to subordinate the functions of the states to national security. Most certainly, Congress could have divested state regulatory agencies of their authority over electric utility and natural gas distribution services and vested such authority in a central federal agency or in federal regional authorities. The compelling irony of this entire case is that Congress took great pains to assure that states and their regulatory commissions were not divested of their authority, but rather were designated a cooperative role in the implementation of the Congressional scheme. (*See* Comments of Senator Henry Jackson (D. Wash.), 123 Cong. Rec. 32393 (Oct. 5, 1977).)

Conclusion

The Energy Law Institute respectfully requests, based upon the foregoing reasoning, that this Court reverse the decision of the United States District Court for the Southern District of Mississippi and declare that Titles I and III and Section 210 of Title II of PURPA are constitutionally valid exercises of congressional power.

Respectfully submitted,

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